HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1003 OF 2005

M/s. Meegee Products. ..Appellant.

Versus.

Sou. Nayan Bharat Davda. ..Respondent.

Shri. T. N. Daruwalla with Shri. Shailendra Bhandari and Shri. Sumeet Basu i/b Shri. J. V. Deshpande for the Appellants.

Shri. Rajiv Patil with Shri. A. S. Kulkarni for the respondents.

CORAM: DR.D.Y. CHANDRACHUD J.

DATE : DECEMBER 6, 2005.

P.C.

1. Admit. Learned Counsel for the respondent waives service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. The Additional District Judge at Solapur, while allowing an interlocutory application in a suit for infringement of a trademark restrained the appellant by an order of injunction from manufacturing, marketing or stocking a disinfectant powder under the trademark "Carbo-dust" during the pendency of the suit.

3. On 21st December 2000 the Respondent applied

for the registration of its product "Herbo-dust", bearing No. 978702-B. Herbo-dust is a disinfectant powder used for spraying in ditches, nullahs, urinals and stagnant water. In the meantime, on 28th March 2003 a Drug Licence came to be issued to the Appellant under the Drugs and Cosmetics Act, 1940 for the manufacture of a disinfectant carbolic powder bearing the mark "Carbo-dust". In the Trademarks Journal dated 14th November 2003, the trademark of the Respondent, "Herbo-dust" was advertised, specifically with a disclaimer to the effect that "registration of this trademark shall give no right to the exclusive use of the words "Dust"". The trademark "Herbo-dust" of the Respondent was placed on the Register on 2nd March 2005. On 19th August 2005, the Respondent instituted a suit for infringement and an ex-parte order was passed on 24th August 2005 which has been confirmed by the impugned order dated 30th September 2005. The correctness of the order the dated 30th September 2005 has been impugned in this proceeding.

4. Now, the approach which the Court must adopt in determining whether the mark of the Defendant bears a deceptive similarity to the mark of the plaintiff is governed by well settled tests, inter alia, laid down in decisions of the Supreme Court. The Court must have

regard to the overall impression created by the mark of the Defendant and consider whether the use of words, the logo and the colour scheme associated with the use of the mark is such as would convey to a purchaser in the class of trade in which the mark is used a distinct impression that the mark of the Defendant is associated with the product of the plaintiff. No individual test can in such matters be regarded as being of overriding importance. In comparing the marks, the Court would undoubtedly have regard to phonetic similarity, if any, the nature of the goods, the nature of the customers and to all other surrounding circumstances having a bearing on the issue.

5. In the present case, undoubtedly, the mark of the Appellant also contains the word "dust" but that by itself is not dispositive of the question of deceptive similarity. Indeed, when the mark of the Respondent was advertised in the issue of the Trademarks Journal dated 14th November 2003, the publication contained the disclaimer that the registration of the mark of the Respondent shall not give any right to the exclusive use of the word "dust". That was because "dust" is a word of common usage and particularly when used in the context of a disinfecting product, it seeks to convey the general meaning that the powder is "dusted" to be effective.

6. This Court has had the benefit of comparing the marks and the manner in which the two products in question are packed and marketed. The Court does not, it is settled, use a fine tooth-tomb to detect dissimilarities, particularly where none exist. The product of the Respondent is sold in plastic bags with a yellow coloured background and a green border, within which the logo "Herbo-dust Powder" appears. Below that it is stated that the product is "ideal for spraying on ditches, garbage, stagnant water, urinals, etc." The product of the Appellant has a logo which is distinctive. Apart from the use of the logo and the mark, "Carbo-dust", the package containing the product of the Appellant contains a statement that it is a disinfecting carbolic powder. The list of ingredients is specified together with the use of the product. Before the Court packages of both the products were produced. The package of the Appellant is of 25 Kgs, whereas that of the Respondent is of 10 Kgs. That is, however, not a matter of overriding importance. For the grant of interim relief the Court must consider whether the overall impression conveyed by the mark of the Appellant will lead a purchaser to believe that the mark of the Appellant is associated with the product of the Respondent. Prima facie, the nature of marks, the logos, the colour scheme and packaging would not be susceptible

of an inference of a deceptive similarity. The use of the word "Carbo" by the Appellant, it has been submitted, is because the product contains carbolic powder which has disinfecting properties. On the other hand, it is contended that the use of the word "Herbo" by the Respondent, would seem to convey the existence of a herbal substance.

7. At this stage, it cannot be said that there is any ground for the grant of interim relief. The mark of the Appellant is not of a nature that will lead a customer to confuse the product of the Appellant with that of the Respondent. The learned trial Judge has noted, and this is a matter of some significance, that many of the purchasers of the products in question are **local govermental authorities** to whom supplies are made for disinfecting operations. The product is, therefore, not a household product available to an unwary purchaser buying the product off the shelf. Obviously, these products are purchased in large quantities by local authorities who follow norms, including the invitation of tenders and a process of selection involving a consideration of the price, quality and efficacy of the rival products. In fact, it was the case of the Respondent, which found acceptance by the Trial Court that the Respondent had received inquiries in regard to

the product "Carbo-dust" of the Appellant. One of those enquiries was from the Chief Officer, Kankavali Nagarparishad. Similarly, the Appellant addressed a letter to the Chief Officer of the Mangalwedha Nagarparishad, in the district of Solapur. It would in my view be unsafe for the Court to proceed at this interlocutory stage on the **assumption** that the Nagarparishads would be confused by the two products. That would be conjecture.

8. The order of the learned trial judge has placed a great deal of importance on the phonetic similarity between the two products. At this stage without embarking upon a detailed or conclusive consideration of the merits, it would be necessary to observe that the words "Carbo" would not convey the same impression as the word "Herbo." That Carbo conveys an association with carbolic powder is a defence which cannot be brushed aside as frivolous, at this stage. The learned Trial Judge has not had regard to the well settled tests which have been laid down in the law for the grant of interlocutory injunctions in such cases. There has been no comparison of the overall impression created by the marks, the logos, the colour schemes and the class of purchasers. The interference of this court is in the circumstances warranted.

9. The impugned order of the Additional District Judge, Solapur dated 30th September 2005 is quashed and set aside and the application for the grant of an interim injunction shall stand rejected. However, since the suit still awaits trial it would be appropriate to direct that the Appellant shall maintain accounts in regard to the manufacture of its product "Carbo-dust" so that in the event it becomes necessary for the Trial Judge at the conclusion of the trial to pass appropriate orders, accounts would be available before the Court. The Appellant shall file accounts of its business in relation to the user of the mark "Carbo-dust" in the Trial Court at quarterly intervals, commencing with the date of the institution of the suit. Fairly, the issuance of a direction in regard to the filing of accounts is not opposed by the appellant. The appeal from order stands allowed in these terms. The trial is expedited. The learned Trial Judge is requested to dispose of the suit expeditiously, preferably within a period of six months from the date of receipt of a certified copy of this order.

(DR. D.Y. CHANDRACHUD J.)